IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.302 OF 2003

Shree Sai Enterprises ... Petitioners

v/s

MTNL and others ... Respondents

Mr Pradeep Sancheti i/b Mr D.P. Guchiya for Petitioners.

Ms S.I. Shah for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 19TH DECEMBER 2005.

P.C. :-

1. By this petition, the petitioners challenge the award made by the Sole Arbitrator dated 27th March 2003. The principal grievance of the petitioners against the award is that the learned Arbitrator has either given no reason for recording the findings or where the reasons have been given, the reasons suffer from non-application of mind to the relevant aspects of the matter. It is submitted that Clause 12.A of the contract between the parties provides that if there are deviations upto 40 %, then the work will be carried out at the same rates which are provided in the contract, but if additional items exceeding the deviation limit beyond maximum of 40 % are ordered, then the contractor shall within seven days from the receipt of the order claim revision of the rates and the engineers may revise the rates having regard to the prevailing market rates and the contractor shall be paid in accordance with those revised rates. The case of the petitioner - contractor in their statement of claim was that they completed 65 % of the contracted work by 15th October 1997 and 75 % of the contracted work by 15th April 1999. According to the contractor, the Executive Engineer Mr Vijay Mody in January 1998 instructed the contractor to carry out the remaining duct work of 12,000 meters of

thick and hard blue U.P.V.C. pipes. The said Executive Engineer told the contractor that the said work with blue U.P.V.C. pipes will be considered as an additional and extra work and deviation beyond the tendered quantity of 120 meter thick blue UPVC will be paid at the rate of Rs.2,400/- per cubic meter. It was also the case of the contractor that they were assured that they will be paid at the rate of Rs.2,400/- per cubic meter. According to the contractor, in terms of these assurances given by the said Executive Engineer, they carried out the work and submitted their claim, but the payments were not made. It was also the case of the petitioners that they were also made part payment at the rate agreed between the contractor and the said Executive Engineer. In the reply submitted by the respondents, it was claimed that even for the blue UPVC pipes, the work was to be carried out at the contracted rate i.e. Rs.240/- per running meter. It was also claimed that as per clause 12.A of the contract, for additional work beyond deviation limit, proposal was not submitted by the contractor. The respondents also referred to the letter dated 15th December 2000 from the respondents to the contractor. It was denied that at any time any promise was given to the contractor that they will be paid at the rate of Rs.288/- per running meter as according to the respondents, it was contrary to clause 12.A of the contract. The contractor has

produced correspondence exchanged between the parties. The correspondence that is on record shows that on 5th December 2000, the contractor addressed a letter to the Executive Engineer Mr Vijay Mody wherein the contractor submitted that Mr Mody himself had submitted a deviation statement of 12,000 meters for sanction. Another letter on record is the letter dated 23rd December 2000 from the respondents to the contractor. That letter is in reply to the letter dated 5th December 2000. In that letter, which is signed by Mr Mody, he stated that he has submitted the file for 12,000 meters of pipes on the instructions of DGM Mr S.C. Mohan, but he denied that he asked the contractor to arrange for UPVC pipes. Reliance was also placed on letter dated 15th December 2000 addressed to the contractor by the respondents. By that letter, the respondents asked the contractor to attend the office regarding reduction of rates of certain items which are going to be deviated during execution of the work. Perusal of the award shows that the learned Arbitrator has not referred to the case of the contractor regarding assurance given to them by the Executive Engineer concerned about the rate at which they will be paid for the deviated quantity. The award also does not consider the case of the contractor that it was not necessary for them to follow clause 12.A because the Executive Engineer himself submitted a proposal for payment for deviated work at the rate of

Rs.288/- per running meter. The learned Arbitrator rejects the claim by observing that the contractor did not submit the proposal required to be submitted according to clause 12.A for deviated quantity and therefore, there is no question of the contractor being entitled to payment at the revised rate for deviated work.

2. I have heard learned counsel for both the sides at length. Perusal of the record shows that admittedly in case deviation exceeded the permissible limit of 40 % clause 12.A of the contract clearly became operative. Clause 12.A of the contract reads as under :-

> "12.A. Execution of works beyond deviation limit :- The Contractor shall execute all works referred to in the contract upon terms and conditions contained or referred to therein and shall carry out such deviations as may be ordered upto a maximum of 40 (Forty) percent of the contract value at the rates / percentage quoted in the tender documents, and is termed as deviation limit of the tender.

. The case of the contractor in this regard is to be found in paragraphs 4(a) and 4(b) of the statement

of claim which read as under :-

"4. Statement of facts on record :

a) The Claimant states that the contract work of project was being run by him satisfactorily and he completed 65 % of the work by 15th October 1997 and 75 % of the work by 15th April 1999 under the active supervision and strict instructions of Exec. Engr. Shri Vijay D. Mody and his subordinate various Asstt. Engineers and Jr. Engr. Shri M.E. Patil of M.T.N.L., Mumbai. The Respondents after being satisfied thereafter occupied it after test and started using as per their requirement as per clause 6 and 6(2) since 16th October 2000. The operations were on and there was no complaint after that from Respondents regarding the quality, quantity and length of the work and thereafter never challenged the completion of the project handed over by the Claimant.

. The basic dispute therefore arose when

the Respondents refused to pay the rates proposed for deviation as per implied action of its payment for the work done and then after he accepted the work in total made suggestion by a letter dated 15.12.2000 (Annexure 'C') that the rates proposed for the deviation of the work was to be reduced. The Claimant was surprised to receive a letter dated 15.12.2000 from Respondents in which he was requested to attend M.T.N.L. office regarding the reduction of rates. This letter was received after the substantial work of 7,500 meters was done and handed over to the Respondents. The Claimant was shocked to note the contents of the letter and was helpless.

b) The Respondent Engineer in charge Vijay Mody being the Exec. Engr. who joined M.T.N.L. office at Vashi in January 1998 on his transfer approached the Claimant and instructed him that out of the remaining duct work 12,000 meters of thick and hard blue U.P.V.C. pipe was to be used instead of thin white PVC pipes on the ground that the ducting work was

to run through rock area and heavy duty traffic road. The Respondent told Claimant that the said work with blue pipe was to be considered as an additional and extra work, deviated beyond the tendered quantity of 120 meter thick blue UPVC and the Claimant will be paid at the rate of Rs.288/- per running meter. The Respondent also assured that the concreting of 1:2:4 on UPVC pipes will be paid at the rate of Rs.2,400/- per cubic meter. The Claimant believed the offer given by the Respondents Vijay Mody and purchased 12,000 meters blue UPVC pipes with the acknowledgment of its arrival and bills of the Company paid by the Claimant (with Excise and Sales tax) expecting that he will get the promised rate. The Respondent also advised the Claimant to start with the work with speed and not to worry about the payments that he will get the promised rate sanctioned and approved from his superiors i.e. tender accepting authority Shri S. Kadir Velan being the Chief Engineer. He also told that his Respondent superiors have already agreed

to this rate and quantum of 12,000 meters of blue UPVC pipes and written sanction was a matter of routine official;

. The Claimant executed the work as per the promise made by the Respondents who also made payments at the promised rate of Rs.288/- per meter for pipes and Rs.2,400/- per cubic meter for concreting in 1:2:4. The bill was received by the Claimant as per the promised rate, the payments of which have ben recorded in the measurement book which is a permanent document of M.T.N.L. showing financial dealings. The measurement Book No.105, 2051 is in the control of Respondents' office. The Claimant was promised that the running bill for the blue pipes shall be paid at the rate of 75 % as per the C.P.W.D. Rules and Regulations and was paid with the promised rate that the balance payment will be made after the work was sanctioned and instructed in clear terms to keep the work continued as per Clause 12 of the tender agreement and C.P.W.D. Rules and Regulations;"

. In paragraph 4 of the defence, the respondents have stated thus :-

> . "Only partially completed duct route i.e. 7445 m. against total duct route of 11,421 m. was handed over to the duct maintenance unit on 15-12-00 (Annexure A34).
> Accepted in Sept. / Oct. 2000.
>
> . The agreement quantity for blue UPVC pipe was only 120 m. at agreement rate of Rs.240/- per running metre. As per clause 12A of the Agreement, the claimant was to submit the claim revision of the rates supported by proper analysis in respect of items beyond deviation limit (upto maximum of 25 % percent) within 7 days from the receipt of order. But claimant never submitted the rate analysis and carried out the work with blue UPVC pipe.
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> . By letter dated 15.12.2000 (Annexure 'C') the claimant was requested to attend MTNL office regarding reduction of rates of items (UPVC pipe), executed beyond deviation limit. The Claimant did not respond to this letter or visited the MTNL office.

. Respondent never promised / never assured the Claimant about the rate of Rs.288/- per running meter as it was against the provision of clause 12A of the agreement, wherein the rates were to be derived having regard to the prevailing market rate and the claimant was to be paid in accordance with the rates so fixed i.e. market rate. The Claimant did not follow this procedure for getting the rate fixed."

. Perusal of the reply quoted above shows that it is not in dispute that the deviation was in excess of 40 %. Therefore, the contractor could have claimed payment at revised rates. Perusal of the reply also shows that the respondents have relied on the letter dated 15th December 2000 addressed to the contractor. It is clear that the case of the contractor was that the deviation was made as per the instructions of Mr Mody, Engineer In-charge and he himself had suggested the revised rate and he also submitted a proposal for making payment to the contractor at the revised rate. Therefore, according to the contractor, it was not necessary for them to submit the proposal as required by clause 12A. In support of that, the contractor relied on the communication dated 23rd December 2000 from the respondents. That communication was in reply to the

letter of the contractor dated 5th December 2000. Perusal of the letter dated 5th December 2000 addressed to the respondents by the contractor shows that the contractor in that letter in clear terms stated that the Executive Engineer himself submitted deviation statement of 12,000 meters UPVC pipes for approval and sanction and orally they were conveyed that it has been sanctioned. Relevant paragraph reads as under :-

> "The Exec. Engr. submitted the deviation statement of 12000 mtrs. for approval and sanction from D.G.M. Shri S.C. Mohan (See MB No.105, Page 47, R.A. Bill X written by Ex.En. only) and conveyed me its message of approval orally."

. This letter was replied by communication dated 23rd December 2000. The reply is signed by Mr Vijay Mody. In that letter he states thus :-

> . "I have never asked you to arrange more UPVC pipes when proposal of use of UPVC pipes was not approved by the competent authority which is still under process. Undersigned can submit the proposal to competent authority with own recommendation, but that is not final till approval obtained

from the competent authority.

. I have submitted the file for 12000 meters on the instruction of DGM Shri S.C. Mohan but I have not asked you to arrange UPVC pipes."

. It is clear from the two communications referred to above that Mr Vijay Mody clearly accepts that he did submit a proposal to the competent authority for sanction and that unless that proposal is sanctioned by the competent authority, it is not final. He also admits that factually he had submitted a statement for approval. That statement in relation to deviation work was submitted for approval is also clear from the letter dated 15th December 2000 on which the respondents rely.

The relevant part of that letter reads as under :-

"You are requested to attend the office at 12.00 hrs. regarding rates reduction of rates of certain items which are going to be deviated / already deviated during execution of the work."

. Perusal of this statement shows that the contractor was being called for discussion regarding reduction of rates in relation to deviation work. Thus,

the material on record conclusively establishes that the Officer of the respondents had prepared and submitted a proposal for sanction of the rates for the deviated work. If that is so, then in my opinion, it was not necessary for the contractor to submit his own statement under clause 12A and therefore, the learned Arbitrator was not at all justified in rejecting the claim made by the contractor only on he ground that they did not submit the statement as required by clause 12A. The finding recorded by the learned Arbitrator therefore suffers from total non-application of mind to the relevant material on record. Whatever reasons have been given by the learned Arbitrator have been given only for rejecting the claim of the contractor for being paid for the deviated work at the revised rates. So far as the other claims are concerned, I do not find any reasons given by the learned Arbitrator. For all these reasons therefore, the petition succeeds and is allowed. The award impugned in this petition is set aside. The respondents are directed to pay costs of this petition to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.